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October Term, 1990

LEE'S SUMMIT REORGANIZED SCHOOL DISTRICT R-7, SCHOOL DISTRICT OF THE CITY OF INDEPENDENCE, NORTH KANSAS CITY SCHOOL DISTRICT, MEMBERS OF THEIR RESPECTIVE BOARDS OF EDUCATION AND SUPERINTENDENTS, et al.,

Petitioners,

v.

JENNIFER T. NAYLOR, et al.,

Respondents.

REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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SUMMARY OF ARGUMENT

As Judge Bowman noted in his dissent, "The illegitimacy of what the panel has done is so painfully obvious. . . . "[1] The sleight of hand relied on by respondents' brief in opposition cannot obscure that illegitimacy. In pursuit of a purpose not assigned to the federal judiciary by our constitution – namely, achieving "racial balance" by coercing a "voluntary" affirmative action plan in the absence of a constitutional violation[2] – the panel invoked its judicial power without constitutional foundation. It also virtually ignored the district court's detailed opinions finding for petitioners and entering sanctions against respondent's counsel for filing a frivolous action. By using its power in such an unrestrained manner, the panel coerced local governmental entities that had committed no constitutional violation.

That unrestrained and extraordinary judicial action departs from established constitutional principles and, to be sure, constitutes legal error. But it represents much more than that. It represents an unprecedented reallocation of the Constitution's division of powers between the

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[1] App. C to petitioners' petition for a writ of certiorari at 8c (Bowman, J., dissenting from the denial of rehearing en banc). The appendix to that petition is cited hereinafter by reference to that appendix (App.) and the specific page number. For example: App. at 8c.

Judge Wollman joined Judge Bowman's dissent. The forcefulness of that dissent, combined with the panel's unusual practice of withdrawing its original opinion and issuing a substitute, highlight the inappropriateness of the panel's action. They also underscore the need for this Court's review.

[2] App. at 6a (Eighth Circuit panel's opinion).

federal and state governments. This Court's writ of certiorari is thus necessary to review such expansive judicial action and rectify the panel's extraordinary and intrusive coercion of local governmental units. When such judicial action is taken without a constitutional violation or other justification for judicial action, as the panel did in this case, it threatens the foundation of federalism. It "tinker[s] with local arrangements . . . at great risk to the health of the body politic." App. at 5c (Judge Bowman's dissent). This tinkering is particularly troublesome in cases like this one, which attract national attention and have nationwide implications.[3]

REPLY TO PETITIONER'S STATEMENT OF REASONS FOR DENYING THE WRIT

I. THOUGH PETITIONERS HAVE NEVER VIOLATED THE CONSTITUTION, THE EIGHTH CIRCUIT PANEL NONETHELESS COERCED PETITIONERS TO PARTICIPATE IN A "VOLUNTARY" INTERDISTRICT AFFIRMATIVE ACTION PLAN (replying to pp. 4-7 of respondents' brief in opposition).

Respondents begin by stating a fact that is both correct and indisputable – petitioners have not violated the Fourteenth Amendment. They then leap to the fanciful conclusion that, therefore, the panel did not coerce

[3] The events in related cases have required review by this Court on two prior occasions. *Missouri v. Jenkins*, 110 S.Ct. 1651 (1990); 109 S.Ct. 2463 (1989). The issues presented by this petition are of wider consequence and importance. In addition, the panel's actions represent an even more extraordinary example of judicial action than that presented by the latter *Jenkins* case – the imposition of a tax by a federal court.

petitioners to participate in an interdistrict affirmative action plan. Though that conclusion would follow from a correct application of *Milliken v. Bradley*,[4] two sources reveal that the panel did not apply *Milliken* but instead used unrestrained judicial coercion to achieve a preconceived result.

First, proof of judicial coercion is found in the panel's opinion itself. In a "painfully obvious" fashion, the panel emphasized repeatedly that a decision by petitioners not to "volunteer" for the panel-devised "voluntary" interdistrict plan "would be a very significant factor in determining [petitioners'] discriminatory intent . . . . " App. at 7a (quoting *Jenkins v. Missouri*, 807 F.2d 657, 687 (8th Cir. 1986) (concurring opinion), *cert. denied*, 484 U.S. 816 (1987)). Similarly, the panel considered in reality only the fact that petitioners had not yet "volunteered" for a voluntary interdistrict transfer plan before unleashing its coercive language. App. at 9-10a.[5] The panel simply was unwilling to consider whether petitioners would volunteer for an interdistrict transfer program "on their own". App. at 10a. Instead, the panel directed "the district court *itself* to formulate and *implement* a plan." *Id.* (emphasis supplied). *See also* App. at 15a ("[T]he interests of the students of the KCMSD and [petitioners] will be well served if all the parties see fit to participate in the [voluntary interdistrict transfer] plan to be promulgated by the

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[4] 418 U.S. 717 (1974).

[5] Specifically, the panel said, "[O]ne thing is clear from the record. Since June 14, 1985, not a single [one of petitioners] has admitted a single black [transfer] student from KCMSD pursuant to a [voluntary interdistrict transfer] plan . . . . " On the other hand, the panel conceded that some of petitioners or other suburban school districts might volunteer if ever presented with a suitable transfer plan.

district court . . . . "). This Court should review such an unprecedented exercise of judicial power, particularly because of its nationwide application to federal and state relationships.

Not only is respondents' fanciful interpretation contradicted by the panel's opinion itself, but Article III of the Constitution makes respondents' explanation for the panel's extraordinary action untenable.[6] The opinion repeatedly expresses the panel's will that a "voluntary" transfer plan be implemented and that petitioners "volunteer" for it. If that cannot be accomplished by judicial arm-twisting or "bullying", the Eighth Circuit panel made it clear, then it will be achieved by contriving a violation out of petitioners' decision not to volunteer for an interdistrict transfer program emphatically denominated as "voluntary." *See* App. at 10a (The "time has come for the district court itself to formulate and implement" a transfer plan.). To believe that the panel has not already decided to order petitioners to participate in a "voluntary" plan, if that is the only way to gain their participation, one must believe that the panel rendered an advisory opinion when it repeatedly warned petitioners about the consequences of not participating. In light of

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[6] U.S. Const. art. III, § 2. Since the time of Chief Justice John Jay, this Court has construed that article to preclude federal courts from issuing advisory opinions. *See, e.g., Princeton University v. Schmid*, 455 U.S. 100, 102 (1982). *See also* 3 H. Johnston, Correspondence and the Public Papers of John Jay 486-89 (1891) (cited in J. Nowak, R. Rotunda, J. Young, *American Constitutional Law* § 2.12, at 56 n.9 (3d ed. 1986)). Respondents themselves recognize this principle. *See* respondents' brief in opposition at 9.

the constitutional prohibition against such opinions, respondents' view of the panel's opinion only underscores the necessity for review by this Court.

Respondents now say that they read some language in the panel's opinion to suggest petitioners have a choice whether to volunteer. The reality of this case exposes that argument as nothing more than certiorari-dodging. The panel has effectively announced that petitioners, if they do not volunteer, will be ordered to participate because any decision not to volunteer will be viewed as a constitutional "failure". *See* App. at 10a. Judge Bowman recognized this irony when he said the panel "has made [petitioners] an offer they can't refuse . . . . " App. at 5c (Bowman, J., dissenting).

The "Alice-in-Wonderland quality," *id.*, of that dilemma deprives petitioners of an essential right in our federal system of justice: an assurance of objectivity. Instead, petitioners are given a constitutionally deficient substitute for a fair hearing – a federal court turned knight errant in pursuit of a purpose it perceives as good. *See* App. at 15a (petitioners' interests "will be well served" if they "see fit to participate"). The absence of constitutional justification for the panel's actions means that its members must have based their opinions not on principles of law, but on their view of social policy. This roving quality substitutes improperly three judges' personal values for the Constitution's commands. Only this Court's review can prevent such a substitution from becoming an acceptable practice for federal courts – not only in this case and the thousands of students it affects,

but also for school districts and other entities considering affirmative action plans across the country.[7]

II. RESPONDENTS' BRIEF IN OPPOSITION MERELY UNDERSCORES THE UNTENABLE NATURE OF THE EIGHTH CIRCUIT PANEL'S ACTIONS IN DEALING WITH IMPORTANT ISSUES OF FEDERALISM AND AFFIRMATIVE ACTION (replying to pp. 7-12 of respondents' brief in opposition).

Respondents, trying to deflect attention from the constitutional shortcomings of the panel's opinion, rely on two procedural arguments. The first is based on a fictional account of the panel's opinion. The second is premised on an analysis never embraced by the panel's majority.

Respondents argue first that the panel's coercive discussion of the voluntary transfer plan was issued in its discussion of the *Jenkins* case. Thus, it purportedly imposed obligations on the State of Missouri only – not on petitioners – and petitioners may not seek review of that portion. *See* respondents' brief in opposition at 7-8. This contention simply ignores that the panel's coercive discussion is aimed, quite explicitly, at petitioners. Consider, for example, the following: "Although we cannot say with certainty that the State *and the suburban school districts* would never agree to a VIT plan on *their* own, after five years, we believe that further delay cannot be

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[7] The panel's second opinion attempts to recast the panel's actions in a more constitutionally palatable form by deleting some of the most overtly coercive components of the first opinion. This is nothing more than an attempt to dodge this Court's review and it cannot obscure the underlying reality of the panel's action. As Judge Bowman put it in his dissent, "the modified opinion is as flawed as its predecessor." App. at 4c.

countenanced." App. at 10a (term "suburban school districts" used by panel to refer to petitioners *and* other school districts not even parties to this case). A fair reading of the opinion shows that the panel aimed its federal judicial power at petitioners. The panel may have taken aim at the State of Missouri as well, but that does not eliminate the panel's unjustified coercion of petitioners.[8]

Second, respondents would have this Court believe that the panel engaged in a reasoned analysis of the facts and law before entering its coercive holding. *See* respondents' brief in opposition at 4-5 (arguing Eighth Circuit "[e]xplicitly rel[ied]" on this Court's decisions in the recent cases on summary judgment standards), 11-15. Respondents bury in a footnote, however, the telling quality of that purported analysis – that it was not adopted by the panel's majority. *See* respondents' brief in opposition at 12 n.9. Indeed, only one member of the panel even purported to evaluate respondents' claim under any legal principles at all. *See* App. at 15-25a

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[8] Even assuming for argument that the decision below was truncated in the manner argued by respondents, this Court may consider questions outside a grant of certiorari "when resolution of those questions is necessary for the proper disposition of the case." *Piper Aircraft Co. v. Renyo*, 454 U.S. 235, 246 n.12 (1981).

Moreover, respondents' argument is not well taken in the circumstances presented in this case. Respondents requested the Eighth Circuit to consolidate this case with issues on appeal in *Jenkins v. Missouri*. *See* letter of respondents' counsel to Chief Deputy Clerk of Eighth Circuit, dated September 14, 1989. It is inappropriate for them to claim now that petitioners may not seek review of all portions of the opinion which aggrieve them.

(concurring opinion of Judge Gibson). The undeniable fact of the matter is that a majority of the panel did not join the concurring opinion's analysis.

Instead, the majority rendered its holding in an opinion that did not cite a single case for a rule of law. *See* App. at 4-13a. The majority did not, as respondents suggest, recognize *Village of Arlington Heights v. Metro. Housing Dev. Corp.*[9] or *Washington Davis*[10] – much less apply and abide by them. No one can pretend that the panel's majority followed those cases or any others, because it never discussed any cases for a point of law. This absence of legal authority emphasizes that the decision below was based not on the law, but on the policy values of the panel's members.[11]

III. THOUGH RESPONDENTS REQUEST THIS COURT NOT TO REVIEW THE DECISION BELOW, THEIR BRIEF IN OPPOSITION ACTUALLY DEMONSTRATES THAT CERTIORARI SHOULD BE GRANTED TO REVIEW THE IMPORTANT ISSUES PRESENTED (replying to pp. 12-15 of respondents' brief in opposition).

Respondents attack petitioners by using statements petitioners purportedly made about the "voluntary"

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[9] 429 U.S. 252 (1977).

[10] 426 U.S. 229 (1976).

[11] To the majority's credit, it realized the district court had applied the law to the facts correctly. Thus, the majority did not even attempt to portray its opinion as anything but an exercise in social engineering. On the other hand, Judge Gibson deserves some credit for trying to make some part of the court's decision resemble an appellate opinion. Unfortunately, that transformation required him to rewrite the facts and ignore the undisputed facts admitted by respondents in the district court. The district court's opinion reflects the record actually created in the district court, as contrasted to Judge Gibson's attempt to recast the record at the appellate level.

interdistrict transfer plan as proof of their discriminatory intent. *See* respondents' brief in opposition at 12-15. Ironically, this tactic disregards the panel's explicit and unappealed ruling that statements by petitioners about the contents of such a transfer plan "may not be used as evidence of racial animus. . . . " App. at 12a. Thus, the Court need not consider the erroneous and misportrayed characterizations asserted by respondents' brief in opposition. The district court concluded – and respondents did not challenge – that two petitioners' suggestions for voluntary transfer plans, made in good faith, were subject to review and revision. *See* App. at 28-29d.[12]

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[12] Respondents state that a school district, not one of petitioners, recently began participating in a transfer program. *See* brief in opposition at 4 n.6. That district agreed to accept ten transfer students. This number is quite different from the massive transfer program outlined by the panel in its original opinion. App. at 10-11b n.4. In addition, respondents fail to note that they approved all of the provisions in that district's transfer plan. Many of those provisions are similar to those proposed by two of the petitioners in this case, ones which respondents now attack as "discriminatory."

Ironically, that a school district has begun accepting transfer students merely highlights the inappropriateness of a federal court trying "to bully [petitioners] into submission not to the law but to the Court's will." App. at 8c. Thus, the panel not only acted without constitutional justification, it also interfered with local governmental affairs by devising a "blunderbuss" cross-district transfer plan. It thereby deprived local governments of the chance to consider or develop their own plans in a coercion-free environment.

CONCLUSION

The panel decided this important case, and its wide-ranging issues, with but one goal in mind: to impose a "voluntary" transfer plan on petitioners. As a result, the panel ignored the Constitution and, simply put, ran roughshod over petitioners. As Judge Bowman observed, "[T]his decision, if it is not overturned, will stand as a monument to the often tempting but always pernicious doctrine that arguably worthy ends justify illegitimate means." App. at 5c. Only by issuing a writ of certiorari can that unfaithfulness to the Constitution's allocation of power be rectified.

Respectfully submitted,

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